LOO HWEE HONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Zahir J.) March 25, 1978]
[Kota Bharu — Criminal Appeal No. 23 of 1974]

Road Traffic — Driving — Using vehicle as public service vehicle — No licence and insurance policy covering third party risks — Fine and disqualification — Appeal — Onus of proof — "Not higher than on a party to civil suit" — "To create a doubt in the prosecution case" — Evidence Act, 1950, s.3 — Road Traffic Ordinance 1958, ss. 74(1) & (2), 92(1), 144(b).

Criminal Law and Procedure — Onus of proof — When presumption is against accused "unless the contrary is proved" — Evidence Act, 1950, s.3 — Road Traffic Ordinance 1958, ss. 74(1) & (2), 92(1), 144(b).

The appellant was charged for using a vehicle as a public service vehicle without a valid licence, an offence punishable under section 92(1) of the Road Traffic Ordinance, and without having a policy of insurance covering third party risks under section 74(1), an offence punishable under section 74(2). He was fined $300 in default 3 months' imprisonment on the first charge and $80 in default 2 weeks on the second charge, and disqualified from driving vehicles under Class D for 1 year. He appealed against the learned magistrate's decision.

The appellant denied taking any fares from his passengers and claimed that they were his friends. Of the 4 passengers in his car, he called only two as defence witnesses. The court had to decide whether the learned Magistrate had misdirected himself in fact and in law in holding that the appellant had failed to rebut the presumption under section 144(b) of the Road Traffic Ordinance.

Held, setting aside the conviction and sentence: (1) the proof required for a conviction was that the vehicle was used as a public service vehicle on that particular date and not whether any passenger was carried for hire and reward. The appellant was therefore at liberty to discharge this proof by any means at his disposal and, if he succeeded, to create a doubt in the prosecution case and this he might do by "disproving" a material fact on which the prosecution relied or by proving facts from which it might be inferred that a material fact on which the prosecution relied was not so probable that a prudent man ought to act upon the supposition that that fact existed;

(2) in criminal matters when the burden of proving an issue was on the accused, i.e. when the law presumed some matter against the accused "unless the contrary is proved" the burden was not higher than on a party to a civil suit. To require every witness to testify as in this case, would mean to require the appellant to prove the case beyond any reasonable doubt and not merely a balance of probability.

Cases referred to:-

(1) *Liew Siew* v. *Public Prosecutor* [1969] 2 M.L.J. 232.

(2) *Saminathan* v. *Public Prosecutor* [1955] M.L.J. 121.

(3) *Public Prosecutor* v. *Ong Hock Thuan* [1963] M.L.J. 10.

CRIMINAL APPEAL.

Foo Say Ghee for the appellant.

Mohamed Apandi bin Ali (Deputy Public Prosecutor) for the respondent.

Mohamed Zahir J.: In this case the appellant appeals against the decision of the Magistrate where the appellant was fined $300 in default 3 months' imprisonment on the 1st charge and $80 in default 2 weeks' imprisonment on the second charge and he was further disqualified from driving vehicles under class "D" for a period of 12 months.

The appellant was charged as follows:

1st Charge:

That you on September 5, 1973 at about 11.25 a.m. at Jalan Ferry Pasir Mas, in the District of Pasir Mas, in the State of Kelantan, being the driver of a Motor Car No. BJ 1236 did use the said vehicle as a Public Service Vehicle without a valid licence authorising such use, and that you have thereby committed an offence punishable under section 92(1) of the Road Traffic Ordinance No. 49/58.

2nd Charge:

That you on the same date, time and place, being the driver of a Motor Car No. BJ 1236 did use the said vehicle without there being in force in relation to the usage of the said vehicle such policy of insurance in such a security of the Third Party Risks under section 74(1) and that you have thereby committed an offence punishable under section 74(2) of the Road Traffic Ordinance No. 49/58.

The evidence that was before the learned Magistrate was that on September 5, 1973 at about 11.30 a.m. the appellant's car was detained for carrying passengers for hire and reward. There were four passengers in his car. There was prior observation of the movements of the car for about 12 days carrying passengers varying in number from time to time. The prosecution did not call any of the passengers as witness. After the case for the prosecution, the Magistrate correctly called for the defence as to the first charge under section 144(b) of the Road Traffic Ordinance 49/58 as the presumption applies. He also called for the defence on the second charge. I have reservations as to calling for the defence on the second charge for reasons I shall later state. The prosecution produced two witnesses, PW1, an Inspector who detained the car and PW2, the Police Constable, who made the observations. At the close of the prosecution case the four passengers were offered to the defence. The defendant informed the court that he required all the four passengers of the car as his witnesses.

In his defence, the appellant who was not represented gave evidence stating that every day he used to come to Pasir Mas to send his brother to school and every time there were people who asked for lifts from him and all were his friends. He said all the passengers were his friends. He denied taking any fares.

Two of the passengers gave evidence and each stated that he or she did not pay any fare to the appellant. DW2 stated further she knew the appellant since childhood since they were neighbours. DW3 also stated that she and the appellant were neighbours and that they knew each other since childhood and that she worked for the appellant's father.

However, the appellant had failed to call two other passengers in the car. Is this fatal?

Counsel for the appellant abandoned all other grounds of appeal except ground (b) as to whether the Magistrate misdirected himself in fact and in law in holding that the appellant had failed to rebut the presumption under section 144(b) of the Road Traffic Ordinance. This section reads as follows:

"(b) that the passengers carried in a motor vehicle were being carried in consideration of separate payments made by them."

Counsel submitted that the learned Magistrate in relying on *Liew Siew* v. *Public Prosecutor*[1] was wrong and submitted further that this case was wrongly decided. The learned Deputy submitted that that case was correctly decided and that the appellant was afforded opportunity to call the witnesses which he failed to do.

In that case, the learned judge after quoting the presumption under section 144(b) said this:

"Here the presumption is that each passenger is presumed to make a separate payment. If this is so, then if any car was carrying five passengers and four gave evidence that they were not passengers in a taxi, had not paid or intended to pay any fare in such a way that they were accepted as witnesses of truth by the magistrate, there remained the status of the fifth passenger. The presumption still arises in respect of the fifth passenger and, if the fifth passenger is not called to give evidence to rebut the prosecution and to prove the contrary on a balance of probabilities, then the presumption means that he is a fare-paying passenger and the driver of the taxi must stand convicted on the pirate taxi charge, since he has carried one passenger for hire or reward."

With respect, I do not agree with this view. I am of the opinion that for an accused person to rebut any presumption cast on him he can do it in any way whatsoever. He may call all the passengers in the vehicle or he may call some of them and elect not to call the others. So long as he is successful in rebutting the presumption or raising a reasonable doubt, then he is entitled to acquittal.

If the law requires, as in this case, that each passenger must give evidence then it may result in an injustice. For instance —

(a) what will the position be if one of the passengers died, is not traceable, or is a mentally deranged person or a child incapable of speech?

(b) what will the position be if one of the passengers is called by the prosecution and his testimony that he pays fare to the accused is not acceptable to the court or if his credit is impeached?

(c) what will the position be if all the passengers were called by the accused and one of them gives evidence against the accused and such evidence is not acceptable to the court or if his credit is impeached?

The appellant was charged only with one charge concerning the four passengers and not four separate charges on every passenger. The proof required for a conviction is that the vehicle is used as a public service vehicle on that particular date and not whether any passenger is carried for hire and reward and therefore the appellant is at liberty to discharge this proof by any means at his disposal and if he succeeds to create a doubt in the prosecution case and this he may do by "disproving" a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon to supposition that that fact exists (see *Saminathan* v. *Public Prosecutor*[2]). The meaning of the word "disprove" appears under section 3 of the Evidence Act which reads as follows:

"'disproved': a fact is said to be 'disproved' when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

In criminal matters when the burden of proving an issue is on the accused, i.e. when the law presumes some matter against the accused "unless the contrary is proved" it is not higher than on a party to a civil suit. To require every witness to testify as in this case, would mean to require the appellant to prove the case beyond any reasonable doubt and not merely a balance of probability. In this case I am of the opinion that the appellant has discharged the onus of proof cast on him.

I said earlier I made reservation as to the correctness of the learned Magistrate calling for the defence on the second charge. My mind is drawn to the case of *Public Prosecutor* v. *Ong Hock Thuan*[3] where Azmi J. (as he then was) held that there was no presumption against the accused in a charge under section 74(2) of the Ordinance. The presumption under section 144 relates only to offences under Part V. Section 74(2) is under Part IV. I do not think it is correct to conclude that since presumption in an offence under Part V has arisen then it extends its operation to another charge under Part IV. For this reason, I am of the opinion that the learned Magistrate should not have called for the defence in respect of the second charge on the ground that the prosecution has failed to prove in their case there was hire and reward. They were merely relying on the presumption which does not operate in the second charge.

I therefore allow the appeal. The conviction and sentence in both charges will be set aside. Any fine if paid should be refunded to the appellant and any disqualification endorsement on the appellant's driving licence should be expunged from record. The vehicle if forfeited should be returned to the appellant.

Appeal allowed.

Solicitors: *Foo Say Ghee & Co.*

PUBLIC PROSECUTOR v. ABDUL AZIZSOU & ORS.

[A.Cr.J. (Mohamed Zahir J.) January 30 and March 26, 1978]
[Kota Bharu — Criminal Appeal No. 43 of 1975]

Customs and Excise — Importing taxable goods on which sales tax had not been paid — Fraudulent evasion of customs duty — Accomplice — Prima facie evidence — Sales Tax Act, 1972, s. 43 — Customs Act, 1967, s. 135(1).

Evidence — Accomplice — Whether there was corroborating evidence.

The first respondent had been charged with the offence of importing taxable goods on which sales tax had not been paid, an offence under section 43 of the Sales Tax Act, 1972; and the first, second and third respondents were charged with being knowingly concerned in a fraudulent evasion of customs duty. The learned President of the Sessions Court acquitted the respondents as he held that one of the witnesses for the prosecution was an accomplice and there was no corroborating evidence. The Public Prosecutor appealed.

Held, allowing the appeal: although the learned President of the Sessions Court was correct in holding that the prosecution witness was an accomplice, he erred in holding that there was no corroboration. There was *prima facie* evidence against the respondents at the end of the prosecution case and they should be called on to enter on their defence.

Cases referred to:-

(1) *Rattan Singh* v. *Public Prosecutor* [1971] 1 M.L.J. 162.

(2) *Regina* v. *Mullins* 3 Cox C.C. 526.

(3) *Lian Teck Chiew* v. *Reg.* [1955] M.L.J. 28.

CRIMINAL APPEAL.

Shaari bin Haji Mohamed Noor (Deputy Public Prosecutor) for the appellant.